

DO NOT PUBLISH

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re

No. 99-45896 JS  
Adv. No. 99-4509 AJ

ROLLIE J. PAUL, JR. and  
BERTHA M. PAUL,

Debtors. /

WILLIE J. LEWIS,

Plaintiff,

vs.

ROLLIE J. PAUL, JR. and  
BERTHA M. PAUL,

Defendants. /

DECISION

By this adversary proceeding, plaintiff Willie J. Lewis ("Lewis") seeks a nondischargeable judgment and other relief against debtor Rollie J. Paul ("Paul") pursuant to Bankruptcy Code §§ 523(a)(2), (4), and (6)<sup>1</sup>. The court will enter judgment against

<sup>1</sup>At trial, Lewis's counsel advised the court that Lewis  
(continued...)

1 Paul in the sum of \$45,000 plus interest pursuant to Bankruptcy  
2 Code  
3 § 523(a)(6)<sup>2</sup>, impose a constructive trust on a certain vehicle  
4 hereinafter described, award Lewis his attorneys' fees for the  
5 present action pursuant to certain provisions of the California  
6 Welfare and Institutions Code hereinafter discussed, and deny the  
7 remaining relief requested.

8 A. Background

9 On August 4, 1996, Curry Lewis ("Curry"), then aged 86 and  
10 now deceased, fell down in his home, and was unable to obtain  
11 help for several days. On August 7, Paul came to Curry's rescue  
12 and transported him to the hospital.

13 Curry was in the habit of keeping large sums of cash at his  
14 house. Before Paul and Curry left for the hospital, Curry  
15 transferred some cash to Paul. While in the hospital, Curry  
16 instructed Paul to enter his home and retrieve some firearms and  
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18 <sup>1</sup>(...continued)  
19 was not going to assert any nondischargeability claims against  
20 debtor Bertha Paul.

21 <sup>2</sup>Bankruptcy Code § 523(a)(6) provides:

22 A discharge under section 727, 1141, 1228(a), 1228(b), or  
23 1328(b) of this title does not discharge an individual debtor  
from any debt—

24 . . .  
25 (6) for willful and malicious injury by the debtor to another  
entity or to the property of another entity;

1 some additional cash. Paul did so, ultimately obtaining  
2 possession of the sum of \$49,000 in cash. Paul contends that  
3 Curry gave him the money as a gift. Lewis claims that Curry  
4 entrusted the money to Paul for safekeeping, and not as a gift,  
5 and that Paul subsequently spent all but \$4,000, which he repaid.

6  
7 Lewis is Curry's nephew, and residual legatee under Curry's  
8 Will. The Inventory and Appraisement for Curry's estate listed a  
9 \$45,000 receivable owing from Paul in respect of the cash  
10 transfer mentioned above, ownership of which is now vested in  
11 Lewis through passage under Curry's Will. Lewis therefore brings  
12 this action in his capacity as Curry's successor.

13 B. Conversion

14 The weight of the evidence supports Lewis's allegation that  
15 Paul converted the sum of \$45,000. The court bases this  
16 conclusion on the following:

17 1. After he received Curry's cash, Paul did not immediately  
18 deposit it in a bank account, the place where most people would,  
19 presumably, place the proceeds of a large cash gift. Rather,  
20 Paul placed it in the safe he kept at his home. Approximately  
21 one week later, on August 14, 1996, Paul used \$23,359.87 of the  
22 cash to fund a payoff on his car loan, but apparently kept the  
23 balance in the safe until he eventually spent it (or as to  
24 \$1,000, returned it; see the next paragraph).

25 2. On October 21, 1996, Leona Williams, representing  
26 Curry's family, demanded in writing that Paul return the funds.

1 A family meeting followed soon thereafter (which Curry did not  
2 attend). At the meeting, Paul agreed to repay the money to Curry  
3 in monthly installments of \$500. Subsequently he surrendered two  
4 \$500 bills that he had received from Curry. Paul testified that  
5 he so agreed merely to keep the family peace. All factors taken  
6 into account, it appears to the court more likely that Paul did  
7 so in acknowledgment that the money was not his to keep.

8 3. On December 17, 1996, Curry filed a complaint against  
9 Paul in the California Superior Court alleging that he had  
10 embezzled the funds. (Curry died on February 23, 1997, while the  
11 action was pending.) Although Paul argues that Curry filed suit  
12 because he changed his mind about the gift, the weight of the  
13 evidence supports Lewis's contention that Curry did not intend to  
14 make a gift.

15 4. Curry took comfort in having possession of large amounts  
16 of cash in his home. Yet no convincing reason presents itself  
17 why he would suddenly decide to divest himself of that cash.  
18 Paul argues that it was gratitude. More likely than not, Curry  
19 entrusted the money to Paul for safekeeping while he was in the  
20 hospital.

21 5. Although Curry enjoyed a close personal relationship with  
22 both Paul and Lewis, Curry had no blood relationship with Paul. (Cur  
23 did have a close, romantic, relationship with Paul's sister.) Curry  
24 survived by a number of blood relatives, including Lewis (his nephew  
25 at least four nieces, and several grand nieces and nephews, all of w  
26 received gifts under Curry's Will, but nothing nearly as large as th

1 \$48,000 in cash that Paul claims Curry gifted him. (Curry left Lewi  
2 wife Mildred \$20,000, and left Paul's sister and his surviving niece  
3 gifts of \$10,000 each.)

4 The court holds that Paul converted the sum of \$45,000 and that  
5 this amount, plus interest at the rate of 10% per annum from

6 /////

7 November 27, 1996<sup>3</sup> is nondischargeable under Bankruptcy Code  
8 § 523(a)(6).

9 C. Constructive Trust

10 It is undisputed that Paul used \$23,359.87 of Curry's cash  
11 to fund a payoff on a loan secured by a 1992 Cadillac El Dorado.  
12 According to Paul's bankruptcy schedules, the vehicle is one with  
13 high mileage, and had a fair market value as of the date of the  
14 petition of approximately \$8,094.

15 California Civil Code § 2224 (West Supp. 1989) provides:

16 One who gains a thing by fraud, accident, mistake, undue  
17 influence, the violation of a trust, or other wrongful  
18 act, is, unless he or she has some other and better  
19 right thereto, an involuntary trustee of the thing  
20 gained, for the benefit of the person who would  
21 otherwise have had it.

22 The court holds that under this provision, Lewis is entitled to

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23 <sup>3</sup>See California Civil Code §§ 3287(a) and 3289 (West  
24 1997), providing for the payment of interest at the rate of  
25 10% per annum on damage awards of a sum certain, commencing on  
26 the day the right to recover is vested. Here, the court  
believes the logical date for interest to commence accruing  
would be November 27, 1996, which is the date by which Curry's  
attorney, William Gibbs, demanded that Paul return the funds.  
See Exhibit 4.

1 impose a constructive trust on the vehicle because Paul had no  
2 right to use Curry's money to pay off the car loan.

3 D. Pain and Suffering; Fees and Costs

4 1. California Statutes

5 Lewis contends that he succeeds to Curry's claims against  
6 Paul for pain and suffering, costs, and attorneys' fees, and that  
7 he is entitled to additional damages in respect thereof pursuant  
8 to California's elder abuse statutes. One potential issue, which  
9 the parties did not brief, is the effect of the California  
10 Legislature amending several of the applicable provisions of the  
11 California Welfare and Institutions Code after 1996, when the  
12 acts complained of occurred. The court will note the  
13 differences, when relevant, but for the reasons hereafter stated,  
14 does not believe that the result herein turns on which version of  
15 the statute governs<sup>4</sup>.

16 Cal. Welfare and Inst. Code (hereinafter, "Welfare") § 15657  
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18 <sup>4</sup>Generally, California statutes operate only  
19 prospectively. Cal. Civ. Code § 3; Evalgelatos v. Superior  
20 Court, 44 Cal.3d 1188, 246 Cal.Rptr. 629, 640 - 42 (1988). In  
21 ARA Living Centers-Pacific, 18 Cal.App.4th 1556, 23  
22 Cal.Rptr.2d 224 (1993), the court was called upon to determine  
23 whether certain amendments to California Welfare and  
24 Institutions Code § 15657, enacted in 1991, operated  
25 retroactively. In doing so, the court distinguished between  
26 statutes that "merely effected a change in the conduct of  
trials", where a statute may be retroactive, and those that  
"changed the legal consequences of past conduct by imposing  
new or different liabilities based upon such conduct", where  
retroactivity would be improper. Here, the court need not  
decide which category the post-1996 amendments fall into.

1 (West Supp. 2000), as now in effect, provides, in relevant part:

2           Where it is proven by clear and convincing evidence  
3           that a defendant is liable for physical abuse as defined  
4           in Section 15610.63, neglect as defined in Section  
5           15610.57, or fiduciary abuse as defined in Section  
6           15610.30, and that the defendant has been guilty of  
7           recklessness, oppression, fraud, or malice in the  
8           commission of this abuse, in addition to all other  
9           remedies otherwise provided by law:

10           (a) The court shall award to the plaintiff  
11           reasonable attorney's fees and costs. The term "costs"  
12           includes, but is not limited to, reasonable fees for the  
13           services of a conservator, if any, devoted to the  
14           litigation of a claim brought under this article.

15           (b) The limitations imposed by Section 337.34 [sic:  
16           the reference should be to Section 377.34] of the Code  
17           of Civil Procedure on the damages recoverable shall not  
18           apply. However, the damages recovered shall not exceed  
19           the damages permitted to be recovered pursuant to  
20           subdivision (b) of Section 3333.2 of the Civil Code.

21           This provision is almost the same as the provision that was in  
22           effect in 1996, the only difference being the statutory cross-  
23           references. See Welfare § 15657, West, Westlaw, through 1997  
24           legislation.

25           Thus, as a matter of California law, a decedent's successor  
26           is not prohibited from recovering on the decedent's claim for  
27           pain and suffering, and attorneys' fees and costs, if the  
28           successor establishes by clear and convincing evidence that the  
29           defendant committed physical abuse, neglect, or fiduciary abuse,  
30           as defined in the statute. See ARA Living Centers-Pacific, Inc.  
31           v. Superior Court, 18 Cal. App. 4th 1556, 23 Cal. Rptr. 2d 224  
32           (1993).

33           Here, there is no claim of physical abuse or neglect as

1 defined in Welfare §§ 15610.63 and 15610.57. Interestingly,  
2 Welfare  
3 § 15610.30 (West Supp. 2000), as now in effect, referenced in  
4 Welfare § 15657, does not include any definition of "fiduciary  
5 abuse". Rather, it defines the term "financial abuse". The  
6 court, however, will construe "fiduciary abuse" in Welfare §  
7 15657 to be synonymous with "financial abuse" in Welfare §  
8 15610.30. Otherwise the reference in Welfare § 15657 to  
9 "fiduciary abuse as defined in Section 15610.30" would make no  
10 sense.

11  
12 Welfare § 15610.30(a)(1) provides:

13 (a) "Financial abuse" means a situation in which  
14 one or both of the following apply:

15 (1) A person, including, but not limited to, one  
16 who has the care or custody of, or who stands in a  
17 position of trust to, an elder or a dependent adult,  
18 takes, secretes, or appropriates their money or  
19 property, to any wrongful use, or with the intent to  
20 defraud.

21 Thus, the definition of "financial abuse" is extremely broad, and  
22 includes any misappropriation of money or property when the  
23 victim is age 65 or older, and thus, is an "elder" under Welfare  
24 § 15610.27 (West Supp. 2000). Under this definition, Paul  
25 committed "financial abuse" because he misappropriated Curry's  
26 money.



1 Welfare § 15610.30, as it read in 1996<sup>5</sup>, the date on which  
2 Paul converted the funds, provided:

3 "Fiduciary Abuse" means a situation in which any person  
4 who has the care and custody of, or who stands in a  
5 position of trust to, an elder or a dependent adult,  
6 takes, secretes, or appropriates their money or property  
to any use or purposes not in the due and lawful  
execution of his or her trust.

7 Under this definition, Paul would have committed "fiduciary  
8 abuse"

9 because he stood in a position of trust to Curry after Curry  
10 /////

11  
12 entrusted him with his cash for safekeeping<sup>6</sup>. Thus, under both  
13 the 1996 and current versions of Welfare § 15610.30, Paul would  
14 have a potential liability for "fiduciary abuse".

15 2. Attorneys' Fees

16 Generally, parties to litigation under Bankruptcy Code §  
17 523(a) bear their own attorneys' fees when the issue is

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19  
20 <sup>5</sup>In 1997, the California Legislature amended Welfare  
21 § 15610.30 (West, Westlaw through 1997 legislation) to read  
22 substantially as it does now, except that it used the term  
23 "fiduciary abuse" rather than "financial abuse". In 1998, the  
24 Legislature amended § 15610.30 (West, Westlaw through 1998  
legislation) again, this time to replace "fiduciary abuse"  
with "financial abuse", but no corresponding change was made  
to Welfare § 15617.

25 <sup>6</sup>In addition, Paul testified that he had taken on a  
26 substantial portion of the responsibility of caring for Curry  
after his accident.

1 dischargeability. In re Fobian, 951 F.2d 1149 (9th Cir. 1991).  
2 An exception exists, however, when dischargeability litigation  
3 includes state law issues, and when attorneys' fees for  
4 litigating those issues are allowable under state law. In re  
5 Baroff, 105 F.3d 439, 441 (9th Cir. 1997). See also Cohen v. de  
6 la Cruz, 523 U.S. 213, 219 (1998) (broadly construing  
7 nondischargeable "debt" in Bankruptcy Code § 523(a) to include  
8 attorneys' fees and treble damages that are awardable under  
9 applicable state law.)

10 Here, Lewis incurred substantially all of his attorneys'  
11 fees and costs in this action to establish the fact and amount of  
12 Paul's liability under California law. It follows that he should  
13 be allowed his attorneys' fees and costs herein pursuant to  
14 Welfare  
15 § 15657. ARA Living Centers-Pacific, 23 Cal. Rptr. 2d at 226.

16 3. Pain and Suffering

17 Cal. Civ. Proc. § 377.34 (West Supp. 2000) provides:

18 In an action or proceeding by a decedent's personal  
19 representative or successor in interest on the  
20 decedent's cause of action, the damages recoverable are  
21 limited to the loss or damage that the decedent  
22 sustained or incurred before death, including any  
23 penalties or punitive or exemplary damages that the  
decedent would have been entitled to recover had the  
decedent lived, and do not include damages for pain,  
suffering, or disfigurement.

24 Thus, a decedent's successor cannot normally recover damages for  
25 the decedent's pain and suffering. Pursuant to Welfare § 15657,  
26 however, this limitation does not apply when the decedent's

1 successor establishes "fiduciary abuse". Lewis therefore  
2 succeeded to any rights that Curry may have had to recover  
3 damages for pain and suffering.

4 Lewis bases his claim for pain and suffering damages on the  
5 testimony of several witnesses who stated that Curry was  
6 extremely distraught after he failed to recover his cash from  
7 Paul. Notwithstanding this testimony, the court declines to  
8 award Lewis damages for pain and suffering. For a plaintiff to  
9 recover, the pain and suffering must be severe, and not trivial  
10 or transitory. See, e.g., Pintor v. Ong, 211 Cal.App.3d 837, 259  
11 Cal.Rptr. 577 (1989). Here, it is not clear how substantial  
12 Curry's distress was, and to what extent that distress resulted  
13 from the accident or the decline in Curry's general health.  
14 Moreover, though not conclusive, the court also notes that  
15 Curry's complaint against Paul did not include a cause of action  
16 for pain and suffering. See Exhibit R. It was only after Curry  
17 died and Lewis filed a complaint against Paul that damages  
18 against Paul for Curry's pain and suffering were requested.

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20

21 E. Punitive Damages

22 Lewis contends that he is entitled to an award of punitive  
23 damages, as Curry's successor. See Cal. Civ Proc. Code § 377.34.  
24 Under California law, the court may impose punitive damages in  
25 cases where the defendant has been guilty of "oppression, fraud,  
26 or malice." Cal. Civ. Code § 3294(a) (West 1997). Imposition of

1 damages under this provision is discretionary with the trier of  
2 fact. See, e.g., Beeman v. Burling, 216 Cal.App.3d 1586, 265  
3 Cal.Rptr. 719, 726 (1990); Pickwick Stages v. Board of Trustees,  
4 54 Cal.App. 739 (1921).

5 According to the California Supreme Court, the purpose of  
6 punitive damages is the "purely public one" of punishing  
7 wrongdoing to protect the public "from future misconduct, either  
8 by the same defendant or other potential wrongdoers." Adams v.  
9 Murikami, 54 Cal.3d 105, 109 (1991) (emphasis in original).

10 To ascertain whether the public interest is served by an  
11 award of punitive damages, the court must consider the nature of  
12 the wrongdoing, the amount of compensatory damages awarded, and  
13 the defendant's ability to pay the award. Adams, 54 Cal. 3d at  
14 110-111; Neal v. Farmers Ins. Exchange, 21 Cal. 3d 925, 928-29  
15 (1978).

16 Here, the court does not believe that additional punishment  
17 beyond rendering Paul's debt nondischargeable "will substantially  
18 serve the societal interest". Adams, 54 Cal.3d at 110. Paul has  
19 just gone through bankruptcy, and by definition, is left with  
20 very little in the way of assets beyond his exempt property. By  
21 virtue of this Decision, he will be saddled with a large  
22 nondischargeable debt. Paul agreed to make restitution before  
23 any litigation was commenced<sup>7</sup>. Under these circumstances, the  
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25 <sup>7</sup>According to Lewis's Trial Brief herein, Curry filed the  
26 suit against Paul because he was "dissatisfied with this rate  
of payment", i.e., payment at the rate of \$500 per month.

1 court declines to award punitive damages.

2 F. Conclusion

3 Lewis is entitled to a judgment against Paul in accordance  
4 with this Decision. The court requests Lewis to submit a  
5 proposed judgment, which may include costs, within 15 days.

6  
7 Dated: January 3, 2001

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Edward D. Jellen  
United States Bankruptcy Judge